United States of America

United States District Court

For The Western District of Michigan

Southern Division

Darryl Lee Haan case No. 1, 03-C V-803

Plaintiff hon. David W. McvKeague

v.

Attorney General of the state of Michigan, et al.

Kent County Friend of the Court

Leisa Ardnt and Robert Ardnt

Defendants

REPORT AND RECOMMENDATIONS

Plaintiff filed his pro se complaint in the United States District Court Middle District of Florida. Tampa division signed October 27, 2003 . Pursuant to 28 U. S. C. & 14 06 a, plaintiffs' complaint was transferred to this court by November 3, 2003. Plaintiff named of Michigan Attorney General, kent county friend-of-the-court, leisa ardnt and Robert ardnt as defendants. Plaintiffs complaint alleges that his rights were violated by Kent County Circuit Court and that Kent County friend of court when he was denied information

on regarding his children and was not offered custody of his children when they were removed from their mother's care. and a violation of state law and his constitutional rights. Plaintiff is asking for damages resulting from the alleged con doubt of the Kent County Circuit Court and Kent County friend of court. The matter it is now before the court on the motion by defendants the Michigan Attorney General to dismissed plaintiffs complaint docket # 10. and plaintiffs' motion for entry of default against the Kent County friend -of-the-court docket # 20. The attorney general seek dismissal on grounds that plaintiff has not alleged any facts to support a claim against it or it establish jurisdiction. Fed. R.Civ.P. 12 b.1.6. plaintiff argues in his motion that a default judgment should be entered against the kent county friend-of-the-court because there has that answered the complaint.

The Kent County friend-of-the-court filed a response to plaintiffs' motion asserting improper service. However.

The Kent County friend-of-the-court also filed answer and defenses in response to the plaintiffs complain. Upon review the record. I find that the defendants motion is meritorious and recommended that all plaintiffs claims against the of the attorney general be dismissed. Additionally, I find that plaintiffs' motion is without merit and recommended to his motion be denied.

Factual allegations

The relevant facts appear from plaintiffs pro se complaint and the attached documents, which plaintiff refers to in his complaint. On or about May 31st, 1985, plaintiff, Darryl Haan, was divorced from his wife. The judgment of divorce was entered in the Kent County Circuit Court. Miss Haan was granted full custody of minor children,laura Diana Haan and Brett Lee Haan and plaintiffs receive visitation and was ordered to pay child support. Plaintiff alleges that he never receive visitation, that his request for information regarding his children were denied, and his complaints were ignored. As a result, plaintiff contends that the Kent County Circuit Court and Kent County friend-of-the-court by late state laws and his constitutional right. Plaintiff argues that the circuit court should then

given him custody or at least given him the opportunity to take custody of his children when they remove from their mother's care. instead of putting them in a foster care. Plaintiff is asking for damages resulting from the alleged time that by the Kent County Circuit Court in Kent County friend-of-the-court. Plaintiff does not allege in his complaint what action the attorney general has taken the violating his rights or state law.

standard of review

When his attorney motion to dismiss for fair to state a claim pursuant to Fed.R.Civ.P.12 b1 &6, a district court's decision to dismiss a civil complaint is a question of law subject to de novo review. C. Perry v. American tobacco co. Inc.-324 F..3d. 845, 848 6th Cir. 2003 Tropf v.fidelity nat`l title ins.co. 289 F.3d. 929, 936 6th Cir. 2002, citation omitted Dismissal is proper call me if there is no doubt that plaintiff can not provide facts that would support his claim showing that he or she is entitled relief. Stemler v.florince, 350 F.3d. 578, 590 6thCir. 2003. This court must consider the complaint in the light most fertile to the plaintiff and except of factual allegation as true. see Montgomery vs huntington bank, 346f.3d. 693, 698 6th Cir 2003. A complaint must contain either direct or indirect allegations respecting all material elements necessary to sustain a recovery

under some viable legal but theory. Michigan Southern r.r.co.v branch& St. Joseph counties rail users ass n. inc. 287. F.3d. 568 573 6th Cir 2002 quoting allard v.weitzan. 991 f2d., 1236. 1240 6th cir. 1993. Although review our rule 12 b. is limited to the well pleaded allegations of the complaint. the court may also rely attached documents specifcally referred to in the complaint. See weiner v.klais and co.. inc. . 1 08 f3d. 86. 89 6th Cir 1997. accord Booker v. GTE. Net llc.350 f3d.515519 6th Cir. 2003. following consideration of documents not included in the complaint without converting the motion into a summary judgment motion.

Discussion

In defendants motion to dismiss

The attorney general argues that plaintiff has it failed to state a claim against him. A motion to dismiss for failure state a claim Allows a defendant to test the plaintiffs' allegations and to determine whether he or she is entitled to relie. F mayer v.mylod.988f2d 635 .638 6th cir. 1993. citation omitted. In order for plaintiff to survive a motion to dismiss his complaint must contain either direct or indirect

allegations respecting all material elements necessary to sustain a recovery under some viable legal theory. Michigan Southern r.r.co v. branch & St. Joseph Counties rail users ass, ninc.287 f 3d 568,573 6th Cir 2002. internal quotations omitted. Plaintiffs complaint fair to make any allegations against the attorney general. The complaint. does not contain any allegations or viable legal theory that would allow the court to even infer a claim against him. Dismissal is proper in plaintiff can not show that he is entitled to relief through facts to support the allegation in his complaint. Brown v. Bargery, 207 f 3d. 863,867 6th Cir 2000. Plaintiff has not made any allegations against the attorney general. and in order to recover under a 42 U. S. C & 1983 violation. assuming this is plaintiffs claim, there must be a deprivation of rights guaranteed by constitutional under color of law. Waters v. city of Morristown. TN.242 f3d.353,358 6th Cir.2001. citation omitted.

dunn v Tennessee.697 f 2d 121.125. 6th Cir .1982. Because plaintiffs complaint merely names the attorney general as a defendant. without alleging any constitutional violations against him. it is subject to dismissal. see Potter v. Clark.497 f 2d 1206.1207. 7th Cir 1974; Murray

v. cityof Chicago.no.02c8387.2003 wl 21641943.at *2 ND iii July 10 2003. unpublished. Gardner v. Brown. no4:90cv135.1991 WL 341747 . at *2 WD mich mar.14 1991. unpublished,. Therefore, I recommend dismissal of the attorney general. because plaintiffs complaint does not state a claim against.

Motion for entry of default

Plaintiff has filed a motion to enter a default against the Kent County friend-of-the-court for failing to file a response to his complaint. It can carry from a court filed a response to plaintiffs' motion urguing improper service. However. the friend-of-the-court also filed an answer and defenses to plaintiffs' complaint with its response to plaintiffs' motion. Plaintiffs failed to serve the friend-of-the-court s required by federal rule 4. Federal rule 4 requires that service and I and a governmental organization be made I its chief executive officer fed.r.civ.p.4j.2 corn. made pursuant to state law. Under the Michigan Court rules. service Attorney Cheri defendant maybe made by Sir any sermons and a copy of the complaint on 1 the chair person of the board of commissioners or the county clerk

of a court.mcr 2.105 g 1 plaintiffs and his complaint to the Kent County friend-of-the-court by express Mail. The complaint in the case was signed for by any individual all is not a Kent County employee. Without proper service, this court does not have jurisdiction to enter a default against the Kent county friend of-the-court pursuant to Federal Rule 55 a. See O.J. distributing. inc v. hornell brewing co..inc..340 f. 3d 345.353 6th Cir2003. amen v. city of Dearborn. 532f2d 554 557 6th cir 1976. Sandoval v. bluegrass Regional mental retardation board.229 f 3d. 1153. at *5, 2000 WL Edberg 1257040 6th Cir . july 11 2000 . unpublished.

Fed rule 55 states that did default is properly a party

fails to plead or otherwise defend. Fed Civ p. 55 . in this case. the defendant was not given notice of its need to plead or defend until it received plaintiffs' motion to enter default. Once notice was received. the kent county friend-of-the-court filed an answer and defenses in response to plaintiffs' complaint.

Therefore. I recommend that the plaintiffs' request for entry of default be denied.

Recommended disposition

For the foregoing reasons. I recommend that the defendants motion to dismiss docket # 10 be granted and the complaint be dismissed against the Michigan Department of Attorney General. Further, I recommend that plaintiffs motion to enter default docket #20 be denied.

Dated March 26. 2004

Joseph G. Scoville

United States Magistrate Judge